IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

SPECIAL CIVIL APPLICATION NO 2788 OF 1992

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MAHESHKUMAR N. KANTHARIA

VERSUS

AO., NAGAR PRATHMIK SHIKSHAN SAMITI SURAT

Appearance:

MR JIVANLAL PATEL for Petitioner

MR RAJESH DESAI for Respondents

CORAM : MR JUSTICE S.K.KESHOTE

Date of Order : 22/03/2001

C A V JUDGMENT

#. This is a petition under Article 226 of the Constitution of India, therein the petitioner prayed for

declaration that the order dated 12.11.1990, Annexure-D passed by the respondent No.1 without following due process of law and without holding inquiry and without affording opportunity of hearing is null, void and illegal and against provisions of Articles 14 and 16 of the Constitution of India. The prayer has also been made for quashing and setting that order. Second prayer is made for declaration that the petitioner continues in service without break as if the order dated 12.11.1990, Annexure-D, has never come into existence and directing the authorities to pay to the petitioner his legitimate dues including arrears of salary and other monetary benefits including all service benefits as may be admissible to the petitioner.

#. The facts of the case as what emerge from the petition are that the petitioner belongs to Scheduled Caste and is SSC and was appointed as Tedagar which is class IV post, equivalent to the post of peon, on 20.7.78 in school No.59 runs and maintained by Nagar Prathimik Shikshan Samiti, Surat. The petitioner later on was transferred to school No.26 under the control of respondent No.1.

The petitioner in June, 1990 felt sick and was under the medical treatment of one Dr.Fatehsinh Rathod from 15.6.1990 to 24.8.1990. The petitioner stated that he sent his leave application through his wife intimating that he is under medical treatment and would report for duty on his recovery. It is admitted that the petitioner does not have copy of the application for leave as the said application was sent through his wife. The petitioner as per his say was advised rest during the period aforesaid. After recovery the petitioner was very infirm and weak and was advised rest. However, in the meantime the petitioner suffered from Falciform Malaria and jaundice and was thus unable to attend the school. He therefore sent another application of leave through his wife. The petitioner was under treatment from 5.9.90 to 4.12.90 of Medical Officer, Rander Health Centre, Surat Municipal Corporation.

#. From these facts, it can be gathered conveniently that the petitioner has not submitted any medical certificate for the period from 25.8.90 to 4.9.90 and secondly for this period he has not submitted any leave application to the respondent and thirdly he has not joined his services on 25.8.90.

#. From the facts of this case, it further transpires that the petitioner has not produced the copy of the

leave applications which were alleged to have been sent to the respondent through his wife. The respondent gave notice dated 8.10.1990 to the petitioner intimating to him that he has remained absent from 15.6.1990 without any reason and that for remaining absent without sufficient cause the petitioner's services could be terminated under the provisions of the Bombay Primary Education Act and the rules framed therein. The petitioner sent reply to the notice aforesaid on 15.10.1990. It is to be noted here that the petitioner has also not produced the copy of his reply to the notice.

#. The petitioner received another letter / order dated 12.11.1990 from the respondent No.1 intimating to him that as per the reply of the petitioner the petitioner had agreed to attend the school from 5.11.90 but he has not reported for duty and, therefore, from that day he has remained absent he should be treated as terminated from that day. The petitioner sent reply to the letter / order dated 12.11.1990 on 16.11.1990. Therein he stated that due to long sickness he was very weak and infirm and was not able to attend till he fully recover from sickness. The petitioner stated that he reported for duty on 5.12.1990 but was not allowed to resume his duty on the ground that he was automatically stood relived from 15.6.1990 vide order dated 12.11.1990. On 16.5.91 the petitioner approached the Mayor of the Surat Municipal Corporation explaining that he had not abandoned his services but was prevented for sufficient reason from attending to his duties due to his illness from 15.6.1990 and that in between the said period the respondent No.1 has passed order terminating his services. The petitioner stated that he was advised to approach the Permanent Conciliation Panch of the Southern Gujarat Chamber of Commerce and Industry and accordingly he approached the said Pancha in December, 1990. It is the say of the petitioner that the respondent No.1 never appeared before the said Pancha as what it is told to the petitioner by the Pancha. It is also stated that the Pancha told to the petitioner that he may approach to the court of law in the matter. The petitioner stated that on this advice being given to the petitioner he has approached this court by way of this petition under Article 226 of the Constitution. This petition is filed in this court on 24.4.1992.

#. Reply to this petition is filed by the respondents and the petitioner has not filed any rejoinder thereto. This petition was admitted on 29.3.1993 but interim relief has not been granted.

#. The learned counsel for the petitioner contended that the termination of the services of the petitioner is wholly arbitrary and unjustified. Even if it is taken to be a case of absence of the petitioner from the duty it cannot be taken to be an act of abandonment of the service and the termination is a major penalty and it is permissible to the employer to impose the same upon the employee after holding the departmental inquiry which has not been held in the present case.

It has next been contended that it cannot be said to be a case of willful absence of the petitioner from duty. He has been prevented from attending duties due to sufficient cause i.e. he was sick.

Lastly it is contended that even if it is taken to be a case of the absence of the petitioner, he being a Class IV employee this penalty given is highly excessive, harsh and disproportionate to the alleged guilt.

#. The learned counsel for the respondent in contra submitted that the petitioner is in habit of remaining absent from duty. The medical certificates are nothing but only the manufactured and procured documents. The petitioner was not indoor patient and the ailment which was mentioned in the medical certificate was not of serious nature which justifies his action not to attend his duty. The learned counsel for the respondent submits that these certificates are not genuine and correct certificates as the petitioner has not produced any corroborative evidence i.e. the prescription as well as the bills of purchase of medicines. The petitioner as per his case was seriously ill i.e. not in a position to attend his duties then certainly the medicines would have been prescribed by the doctor. Not only the medicines, the doctor would have also advised him to undergo some pathological tests. The medicines are to be purchased in case he would have been really sick but the petitioner has not produced any material in support of these documents and the same may not be relied upon. It is submitted that one certificate was obtained by the petitioner after the termination of services. It is submitted that these certificates were not produced before the school authorities. These are produced first time before this court. The theory of submitting the leave applications is wholly incorrect and concocted one in fact and substance. The petitioner in case he would have been really ill could have sent the medical certificate along with application by Registered Post A.D.. He has not sent any application and this is

apparently a concocted and manufactured defence which has been taken by him. In the facts of this case the respondents have rightly terminated the petitioner from the services. This has been done after affording full opportunity to the petitioner. He was given one more chance to join the duties but that has not also been availed by him.

#. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

##. The petitioner has not produced any cogent and satisfactory evidence that two times he had sent leave applications to the respondents. I find sufficient merits in the contention of the learned counsel for the respondent that two times leave applications sent by the petitioner to the respondents through his wife is a manufacture and concocted plea. The petitioner has also not produced affidavit of his wife in this petition. Such a plea can be raised and is easy to be raised but difficult to believe. It is a serious matter where the petitioner was absent from duty from 15-6-90 and if he would have been ill he should have sent this application along with the medical certificate to the respondent by some mode to prove this fact. The respondents have not admitted the receipt of any leave application of the petitioner. It is a disputed question of fact and heavy burden lies on the petitioner to discharge the same and in this case he utterly failed to discharge the same. If on such plea any relief is granted then it will be serious and danger to the employer. Such a plea can be manufactured, concocted and made a ground for challenging the order of termination/removal. In a case where the employee could not attend the duties, he has to send an application and if he is ill, a medical certificate by registered post A.D. or by some other mode and receipt thereof has to be taken from the concerned person. In this case even the petitioner has not bothered or cared to keep the copy of the application. He has stated that he does not have the copy of the application of leave as the application was sent through his wife and from these averments it is clearly borne out that it is nothing but only a concocted and manufactured defence. Even if it is taken that this application was sent through wife, what was the difficulty with the petitioner to keep copy of the same. Same is the case with the second application. In these facts, it is difficult to accept that what the petitioner sated that he sent his leave applications through his wife to be correct. It is held that the petitioner has not sent any leave applications to the respondents.

##. Reply to the special civil application has been filed by the respondents and rejoinder thereto is not there on the record. It is also not the case of the petitioner that any rejoinder to reply has been filed. Otherwise also, learned counsel for the petitioner admitted that the petitioner remained absent from duty for the period from 28-2-90 to 6-4-90. It is not in dispute that earlier also the petitioner remained absent unauthorisedly i.e. without any prior intimation or getting leave sanctioned from the superior authority for the period from 28-2-90 to 6-4-90. In this case the services of the petitioner are not terminated on the ground of remaining absent from duties for the period aforesaid. From the document annexure `D', I find that his services were terminated on the ground of leaving absent from 15-6-90. However, this unauthorised absence of the petitioner for the period from 28-2-90 to 6-4-90 is relevant and materia in this case. The petitioner approached to this Court seeking relief under its extraordinary discretionary equitable jurisdiction i this case. The conduct of litigant who approaches to this Court seeking relief under its extraordinary equitable and discretionary remedy is very important and relevant. It is not the law nor any decision that even if the action of the employer is found to be incorrect or illegal or contrary to basic principles of natural justice or provisions of any Act or Rules, the rule is to grant relief to the litigant. The Court exercising its extraordinary equitable relief under Article 226 of the Constitution legitimately can deny relief to the litigant where his conduct is of such a nature which justifies the same. It is no more res integra that in a case where the misconduct has been admitted then before terminating the services of the employee, it is not required or obligatory or incumbent upon the employer to give him show cause notice or to hold any inquiry. There cannot be two opinions on the question that remaining unauthorisedly absent from duty by employee is a grave and serious misconduct and on proof or admission of the same, the employer has all the right to dispense with the services of such an indisciplined employee. Reference here may have to the decision of the Apex Court in the case of Dharmarathmakara Raibahadur Arcot Ramaswamy Mudaliar Education Institution vs. Educational Appellate Tribunal reported in 1999 (7) SCC 332. In para-8 of the judgment, their Lordships of the Hon'ble Supreme Court held:

8. The contention of learned counsel for the respondent is confined that there was no enquiry in terms of Section 6 of the said Act. There is no submission of any defence on merit. Even before us when we granted learned counsel an opportunity to give any prima facie or plausible explanations on opportunity or an enquiry of course is a check and balance concept that no one's right be taken away without giving him/her opportunity or without enquiry in a given case or where the statute requires. But this cannot be in a case where allegation and charges are admitted and no possible defence is placed before the authority concerned. What enquiry is to e made when one admits violations? When she admitted she did not join M.Phil course, she did not report back to her duty which is against her condition of leave and contrary to her affidavit which is the charge, what enquiry was to be made? In a case where the facts are almost admitted, the case reveals itself and is apparent on the fact of the record, and in spite of opportunity no worthwhile explanation is forthcoming as in the present case, it would not be a fit case to interfere with the termination order.

##. There is another conduct of the petitioner on which this petition deserves to be dismissed. Leaving apart the question what weightage has to be given to two medical certificates produced by the petitioner by this Court or to what extent reliance could be placed on these two medical certificates, it is not in dispute that the petitioner has not produced any medical certificate for his ailment for the period from 25-8-1990 to 4-9-1990. It is also not the case of the petitioner that for this period he has applied for leave. It is an admitted position that for this period aforesaid, the petitioner has not applied for leave nor he has produced any document before this Court for his illness and lastly he has not shown any cause for which he was prevented from attending his duties from 25-8-1990. For this absence also, which is clearly an unauthorised absence and a serious and grave misconduct of the petitioner, the services of the petitioner could have been brought to an end and for this also, the matter is squarely covered by the decision of the Apex Court in the case of Dharamarathmakara Raibahadur Arcot Ramaswamy Mudaliar Educational Institution vs Educational Appellate Tribunal (supra).

##. It is difficult to accept that the petitioner was

not given reasonable opportunity in the matter before terminating his services. From the document annexure `C' of the compilation of the special civil application, I find a notice has been given to the petitioner to show cause. Reply to this notice has been given by the petitioner and therein he has assured that he will report for duty on 5-11-1990 but he did not report for duty on 5-11-1990, the respondents were perfectly legal and justified in the matter to dispense with his services. There was no necessity or obligation on their part to show any further indulgence or mercy to him. Earlier it has been shown for the period during which he remained absent i.e. from 28-2-1990 to 6-4-1990. From the reply to the special civil application, I find that on that occasion, the services of the petitioner could have been terminated. The petitioner has no explanation whatsoever for this absence. Whatever explanation is furnished firstly of sickness and secondly death of husband of his sister are hardly of any defence but in fact in the context for illness or sickness, no medical certificate has been produced and so far as the death of the husband of the sister is concerned, even if it is correct, he was not required to remain absent for such a long period. The concession has been extended and the petitioner also assured to be punctual in future. He was taken back in services but he could not stand to his commitment and for such an indisciplined person what it was minimum to be ordered, has been ordered in this case by the respondents and to this action of the respondents, no exception can be made.

##. It is a clear case of unauthorised absence of the petitioner from duty. He has no cause much less a sufficient cause for this absence. The medical certificates which are produced by the petitioner are of little help to him. These two medical certificates are not produced by the petitioner before the respondents. They are produced before this Court in these proceedings under Article 226 of the Constitution. This Court is not sitting as an appellate court over the decision of the Disciplinary Authority. This Court sitting under Article 226 of the Constitution cannot appreciate the evidence. Judicial review in such matter is only relating to decision making process of the authority. As these certificates were not produced before the respondents, the same cannot be allowed to be produced in a petition under Article 226 of the Constitution. It is not a case where any evidence has been produced and the same has not been considered. At least one certificate as per its date was in existence or would have been existence but it was not produced. So far as the second certificate is

concerned, it is of date after the date of order of termination of the services of the petitioner. I find sufficient merits in the contention of the learned counsel for the respondents that as these certificates were not produced before the respondents, the same may not be considered by this Court sitting under Article 226 of the Constitution. Otherwise also, if we examine these certificates in the light of the facts of this case, both are nothing but only procured document for the sake of defence. This document, annexure `A' appears to have been obtained after the order dated 12-11-1990 has been passed by the respondents and it appears to be taken in back date. This certificate nowhere bears any number of the register of 15-6-90 of the patient register to be maintained by the Doctor. It is easy to give such certificate in ante date. It is very dangerous to rely on such certificates in all the cases. Unscrupulous litigants/employees take such certificates to have benefits thereof. Merely because Doctor gives certificate, it is not the law that it has to be accepted to be true and correct. There are three reasons for which this certificate cannot be accepted. Firstly, the petitioner has not submitted any leave application for the period from 15-6-90. Secondly, though this certificate was dated 24-8-90 and it would have been in possession of the petitioner if it is correct before the receipt of notice of respondents dated 8-10-1990 and reply given to this notice, if this certificate would have been in existence at that time, this would have been enclosed to the reply to that notice but it has not been done. The petitioner on the record of this petition has not produced copy of the reply which is sent to the notice of the respondents annexure `C'. Nonproduction of this document by the petitioner creates suspicion in the mind of the Court. Otherwise also, an adverse inference can be drawn for nonproduction of this document that in case it would have been produced it would have gone against the petitioner. From the petitioner's own document annexure `E' dated 16-11-1990 in which he has also not mentioned that he was ill during the period from 15-6-90 to 24-8-90 he was under the treatment of Dr. Fatehsinh M. Rathod and fitness certificate has been given to him to resume his duty on 24-8-90. Next application is of date 5-11-1990 in which also, this has not been mentioned. Thirdly, the petitioner remained ill for more than two months as per this certificate and as per his say, then certificate of Doctor would have been there prescribing medicine to him as he is running a private clinic has not been produced on record. From his clinic, the record can be produce if it is there. In case where the Doctor prescribes the medicine to be

purchased from outside then he can produce the cash memos. Dr. Fatehsinh Rathod was present in the court and he stated that record is not available. This is another fact which created doubt in the mind of the Court. There is all possibility that this certificate is got prepared by the petitioner ante date for his cause for absence.

##. So far as the second certificate is concerned, it is again for illness for the period of near about nine months. The petitioner was reported to be fit to join his duties on 24-8-90 and if from the very next date he would not have been in a position to attend the duties, he could have taken treatment but that has not been done. Now from 5-9-90 he was treated by Medical Officer, Rander Heath Centre as an outdoor patient. There is an apparent fact which emerges from this certificate which makes it clear that the petitioner is an absolute liar. He was not ill and he manufactured this document. This certificate certifies that he was under treatment for falcifarum malaria as an outdoor patient of this hospital from 5-9-90 and outdoor registration no. 1271 of 25-8-90. This outdoor registration has been made on 25-8-90 as he wanted to show his absence due to a sufficient cause. This certificate is absolutely a manufacture document. This is a clear case of using of some blank space in the register. The petitioner has not produced the prescription when he was an outdoor patient from 25-8-90. This prescription has to be prepared and it has to be produced. It was not produced. This date 25-8-90 if we go by the document is a deliberate attempt. There are two contrary statements in this certificate. Outdoor registration No. of 25-8-90 and he was under the treatment of hospital from 5-9-90. These two do not tally and makes this certificate to be nothing but only a manufacture document. The petitioner has not produced any cash memo for the purchase of medicine. Naturally if he was outdoor patient, doctor would have prescribed medicine and in case he really would have been ill and certificate would have been genuine, then medicines would have bene purchase. Hence, this certificate also cannot be relied upon. Though at one point of time, I thought of to call the record of Surat Municipal Corporation re. issue certificate to the petitioner as it prima-face appears to be a manufacture document but taking into consideration the fact that the petitioner is a Class-IV employee his services are terminated, I do not consider it to be appropriate to proceed in that direction. There is also another possibility that doctor may not be available or the record may not be available. However, this petitioner, otherwise also, in the facts of this

case is not fit to be retained in services. He is most indisciplined person and in a habit of telling lie and manufacturing documents.

##. In the result, this special civil application fails and the same is dismissed. Rule discharged. Interim relief, if any, granted stands vacated. The petitioner is directed to pay Rs.1000/- as costs of this petition to the respondents No.1 and 2.

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